

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

MICHAEL G. SENDLBECK, et al.,

Plaintiffs,

01-CV-0371A(Sr)

v.

CHARLES FLYNN, et al.,

Defendants.

REPORT, RECOMMENDATION AND ORDER

This matter was referred to the undersigned by the Hon. Richard J. Arcara, , in accordance with 28 U.S.C. § 636(b), for all pretrial matters and to hear and report upon dispositive motions. Dkt. #19 & 99.

On May 23, 2006, the Court issued an Order directing plaintiffs to respond to their attorney's motion to withdraw as counsel and to appear before the Court on July 7, 2006. Dkt. #179. On that date, the Court granted counsel's motion to be relieved as counsel for plaintiffs. Dkt. #182. Because plaintiffs failed to appear as directed, the Court also issued an Order to Show Cause why this matter should not be dismissed for failure to prosecute pursuant to Fed. R. Civ. P. 41(b), and warned plaintiffs that their failure to appear would result in the dismissal of this action with prejudice. Dkt. #183.

On July 31, 2006, the return date for the Order to Show Cause, plaintiffs Anthony L. Orsini, Jr., Thomas W. Pecoraro, and Louis P. Corrigan appeared before the Court and requested time to retain new counsel. Dkt. #184. The Court granted that request and scheduled a status conference on November 3, 2006. Dkt. #185.

Plaintiffs did not appear at the status conference scheduled on November 3, 2006. Dkt. #186. As a result, the Court ordered plaintiffs to appear before the undersigned on December 5, 2006 and show cause why the matter should not be dismissed for failure to prosecute pursuant to Fed. R. Civ. P. 41(b), and warned plaintiffs that their failure to appear would result in the dismissal of this action with prejudice. Dkt. #187. Plaintiff Louis P. Corrigan was the only plaintiff to appear as ordered. Dkt. #188. Mr. Corrigan represented to the Court that he did not wish to continue to prosecute this action.

Defendants moved to dismiss the complaint for failure to prosecute pursuant to Fed. R. Civ. P. 41(b). Dkt. #189, 191 & 193. Plaintiffs failed to respond to the motions.

As a result, it is recommended that the Court exercise its discretion, pursuant to Fed. R. Civ. P. 41(b), to dismiss this action for failure to comply with court orders order and failure to prosecute.

Accordingly, pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED, that this Report, Recommendation and Order be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report, Recommendation and Order must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report, Recommendation and Order in accordance with the above statute, Fed.R.Civ.P. 72(b) and Local Rule 72.3(a)(3).

The district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but was not presented to the magistrate judge in the first instance. See, e.g., *Patterson-Leitch Co. v. Massachusetts Mun. Wholesale Electric Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed.2d 435 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Report, Recommendation and Order), may result in the District Judge's refusal to consider the objection.

The Clerk is hereby directed to send a copy of this Order and a copy of the Report and Recommendation to the plaintiffs and the attorneys for the defendants.

SO ORDERED.

DATED: Buffalo, New York
February 26, 2007

S/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge